"... It is the second defendant's contention that the dismissal of the first defendant was not within the period of years during which he has agreed to serve the University. This clause could only operate against him after he had completed his course of study leading to the Ph.D. There is no evidence that the first defendant had completed his Ph.D.

On close and proper construction of this clause, one could not help but to agree with the counsel that the first defendant only agreed to serve the University on completion of his Ph.D. ..."

Indeed, he found on the evidence before him that there was no evidence that the first defendant had completed his Ph.D.

In our view, where the question is, as here, as to the sufficiency of evidence, the state of the pleadings is more important than the way in which the case is shaped in argument. Under the agreement, the first defendant agreed to serve the plaintiff for a period of years on his completion of his Ph.D. course. The second and third defendants could only be liable if the first defendant were dismissed for misconduct, negligence or indifference to his duties within the period of years of service after the completion of his Ph.D. course. This is clearly set out in paragraph (3) of clause 7 of the agreement. The first thing we would expect the plaintiff to establish was the award of Ph.D. to the first defendant. If the first defendant had completed his course there was no evidence to show that he had been awarded a Ph.D. by Stanford. We fail to see how the second and third defendants should be made liable as sureties in the circumstances. There must be a breach before liability can arise.

If the first defendant had obtained his Ph.D. and returned to work and behaved himself in the way he did he could not blame the plaintiff for his dismissal. In such a situation the sureties would be liable. However, if he had not obtained his Ph.D. but was recalled to continue in his service to the University and he behaved in the way he did, his dismissal following the disciplinary proceedings, then the sureties cannot be faulted. In such a situation, the sureties should not be made liable. The first defendant was in the service of the plaintiff as a tutor before he went to do his Ph.D. In our view, his recall to service was not a breach by the first defendant of any of the paragraphs of clause 7 of the agreement. He had abandoned his course of training with the consent of the plaintiff and the subsequent service was not under the agreement.

On his ground alone, we would dismiss the appeal with costs. Since the service after the first defendant's return is outside the ambit of the agreement, we do not consider that we need to deal with the question of variation. Deposit to respondent on account of taxed costs.

Appeal dismissed.

Solicitors: *Nordin Torji & Yussof Ahmad; Hazzan & Fadzil; Lawrence & Joseph, Mahalingam & Co.*

MANILAL & SONS (M) SDN. BHD. v. M. MAJUMDER

[S.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman & Wan Hamzah S.C.JJ.) 7 September 1987 & 25 April 1988]

[Kuala Lumpur – Supreme Court Civil Appeal No. 52 of 1987]

Civil Procedure – Order of High Court restored on appeal by Privy Council – Subsequent application to High Court – Whether judge of High Court has power to alter the order of the Privy Council.

In this case, the appellant had sued the administrators of the estate of Ratnavale, deceased, for the balance of the sums alleged to be paid to the deceased. The learned judicial commissioner found in favour of the appellant and held that the money was paid to the deceased on the security of a lien and equitable charge in respect of land in Kedah. He also held that the action was not barred by limitation. On appeal, the Federal Court held that of the two sums paid to the deceased the larger amount was statute-barred and therefore allowed the appeal (see [1975] 2 M.L.J. 207). The appellant appealed to the Privy Council (see [1986] 1 M.L.J. 357) which allowed the appeal and restored the order of the judicial commissioner with the deletion of the words "on the security of a lien and equitable charge in respect of Lots 290 and 461, Mukim of Kulim, Kedah". Following the decision of the Privy Council, the respondent applied for an order to transfer the said Lots 290 and 461 to herself and to remove the caveats lodged by the appellant over the said land. The learned judge granted her application. The appellant subsequently applied to have the *ex parte* order vacated and set aside. The learned judge dismissed the appellant's application and confirmed the *ex parte* order. Further, the order went on to state:

"And it is also ordered that paragraph 3 of the order of the Ipoh High Court dated 22 March 1983, as restored by the Privy Council order dated 30 August 1986, imposing an injunction to restrain all dealings in Lots 290 and 461 Mukim of Kulim, Kedah be and is hereby deleted."

The appellant appealed.

Held, allowing the appeal: the learned judge has no jurisdiction to alter the decision of the Privy Council.

Cases referred to:

(1) *Manilal & Sons (M) Sdn. Bhd.* v. *Mahadevan & Anor.* [1986] 1 M.L.J. 357 (P.C.) (refd).
(2) *Mahadevan & Anor.* v. *Patel* [1975] 2 M.L.J. 207 (refd).
(3) *Fritz* v. *Hobson* (1880) 14 Ch.D. 542 (distd).
(4) *Ibralebbe & Anor.* v. *R.* [1964] 1 All E.R. 251 (cited).
(5) *Walsh* v. *Alexander* (1913) 16 C.L.R. 293 (refd).

SUPREME COURT.

C.V. Das (*Gan Teik Chee* with him) for the appellant.

Abdul Rahim Noor (*Paul S. Subramaniam* with him) for the respondent.

Cur. Adv. Vult.

Lee Hun Hoe C.J. (delivering the judgment of the court): We allowed the appeal and stated that we would give our reasons later. We do so now.

The facts may be stated shortly. On 20 December 1966, the appellant paid Mr. Ratnavale $29,500 and on 21 March 1967 a further sum of $250,000. On 20 June 1968, Mr. Ratnavale repaid the appellant $50,000, leaving a balance of $229,500. Mr. Ratnavale died on 19 April 1973. The appellant sued the administrators of his estate to recover the sum owing. The learned judicial commissioner found in favour of the appellant and held that the money was paid to the deceased on the security of a lien and equitable charge in respect of the land in Kedah. He also held that the action was not barred by limitation. On appeal, the Federal Court held that of the two sums paid to the deceased the larger amount was statute-barred, and therefore allowed the appeal. The matter went to the Privy Council.

In allowing the appeal in *Manilal & Sons (M) Sdn. Bhd.* v. *Mahadevan & Anor.*[1] the Privy Council restored an order made by the judicial commissioner in Ipoh High Court Civil Suit No. 235 of 1974 with the deletion of the words "on the security of a lien and equitable charge in respect of Lots 290 and 461, Mukim of Kulim, Kedah" italicized below. The order of the High Court is set out below:

"*ORDER*

This action having been tried before the honourable judicial commissioner Mr. E.E. Sim on 18 September 1981, 9 December 1981, 23 June 1982, 24 June 1982, 25 June 1982, 3 August 1982, 4 August 1982 and 5 August 1982 in the presence of Mr. Gan Teik Chee of counsel for the plaintiff abovenamed and Mr. W.S.W. Davidson of counsel for the defendants abovenamed and coming up for judgment this day.

It is ordered that the defendants do repay the plaintiff the balance sum of $229,500 paid by the plaintiff to the deceased *on the security of a lien and equitable charge in respect of Lots 290 and 461, Mukim of Kulim, Kedah, with* interest thereon at the rate of 10% per annum compound interest with yearly rests from 21 June 1968 to date of delivery of judgment and thereafter at 8% per annum to date of satisfaction:

And it is ordered that the defendants be and are hereby restrained from transferring, charging or in any way dealing with the said Lots:

And it is also ordered that the defendants do pay the plaintiff costs of this suit.

Dated the 22nd day of March 1983."

Following the decision of the Privy Council, the respondent by *ex parte* originating summons dated 22 November 1986 applied, *inter alia,* for an order to transfer the said Lots 290 and 461 to herself and to remove the caveats lodged by the appellant over the said land. On 24 November 1986, the learned judge granted her application. The appellant sought to have the *ex parte* order vacated and set aside. On 26 January 1987, the learned judge dismissed the appellant's application and confirmed the *ex parte* order. Further, the order went on to state:

"... *And it is also ordered* that paragraph 3 of the order of the Ipoh High Court dated 22 March 1983, as restored by the Privy Council order dated 30 August 1986, imposing an injunction to restrain all dealings in Lots 290 and 461 Mukim of Kulim, Kedah be and is hereby deleted ..."

Here the learned judge had clearly altered the order of the Privy Council by deleting the injunction. Also, if the respondent was allowed to get the land in the way she did, it would render the Privy Council decision nugatory. The right of the appellant to caveat was heard previously. The Federal Court, in dismissing the appeal in *Mahadevan & Anor.* v. *Patel,*[2] held that the company had a caveatable interest in the land and upheld the decision of the learned judge in refusing to remove the caveats. We should point out that the appeal involved the same land, *i.e.* Lots 240 and 461 and that Patel was the managing director of Manilal & Sons (M) Sdn. Bhd., the appellant in the present appeal.

First, the learned judge was bound by the Privy Council decision. He had no jurisdiction to alter an order of the Privy Council. He could only act in execution of the order of the Privy Council. The learned judge cited *Fritz* v. *Hobson*[3] which laid down that in every order of the court liberty

to apply to the court is implied, without its being expressly reserved. However, he was not dealing with an order of the High Court but that of the Privy Council, an entirely different kettle of fish. This is not a case where the High Court made an order to set aside the injunction on the hearing of a formal application for such order on its merits. The record does not show that there was such application. But the learned judge made the deletion order of his own motion.

In *Ibralebbe & Anor.* v. *R.*[4] the headnote states that an Order in Council that forms the instrument by which the decision of an appeal from colonies or other dominions of Her Majesty abroad is implemented is essentially a judicial act, and the Judicial Committee is not in essence an institution of the United Kingdom but, where a right of appeal to Her Majesty in Council lies from territory outside the United Kingdom, the appeal is part of the judicial system of the territory from which the appeal comes. At p. 257 Lord Radcliffe observed:

"The Judicial Committee itself has been insistent on many occasions to record and explain its independent legal status. Thus as early as 1880 Sir James Colville in *Pitts* v. *La Fontaine* ((1880) 6 App. Cas. 482, 483) defines the position as follows:

'When a decision of this Board has been reported to Her Majesty and has been sanctioned and embodied in an Order in Council it becomes the decree or order of the final court of appeal ... and ... it is the duty of every subordinate tribunal to whom the order is addressed to carry it into execution.' "

Section 77 of the Courts of Judicature Act 1964 provides that:

"Any person who desires to enforce or obtain execution of any order of the Yang di-Pertuan Agong shall file in the Federal Court a certified copy of the order which shall be enforced or executed in the same way as is enforced or executed a judgment of the Federal Court."

With the abolition of appeals to the Privy Council, section 77 has been repealed. However, section 3 of the Courts of Judicature (Amendment) Act 1984 which came into force on 1 January 1985 states:

"3.(1) The repeal of Part IV of the principal Act shall not apply to any appeal, application for leave or application for special leave made under that Part which is pending at the date of the coming into force of this Act.

(2) Notwithstanding the repeal of Part IV of the principal Act, sections 76, 77 and 78 of the principal Act shall continue to remain in force for the purpose of sub-section (1)."

In dealing with the order of injunction which was left intact by the Privy Council, the learned judge stated at p. 13 of the appeal record:

"... The survival of this paragraph became the bone of contention in this originating summons in relation to the said Lots, *viz.* Lot 290 and Lot 461, Mukim of Kulim, Kedah (hereinafter called the said Lots)."

At p. 21 he said:

"... The injunction was to all intents and purposes, in my view, to enable an equitable charge to be executed and such equitable charge was found by the learned judicial commissioner to be a temporary security for the payment to the deceased of those two sums, pending the sale of Meera Estate ... "

He went on to say at p. 24:

"... From the facts or circumstances, the only rationale for making the order for the injunction was to shore up the said equitable charge and to enable it to be executed."

What he had so far stated was right. This was conceded by the appellant. But he went wrong, when he considered that the deletion of one part must also meant the deletion of another part. For he stated at p. 24:

"In my judgment, the necessity for the injunction (with the removal of that part of the order for the payment of the judgment sum to be secured by the lien and equitable charge) had ceased to exist."

With great respect, it is not for him to speculate as to the effect of the order of the Privy Council and to alter it. His only duty is to execute the order of the Privy Council. The Law Lords thought fit in the circumstances to delete that part of the order in respect of a lien and equitable charge. They explained it in the penultimate paragraph of their judgment at p. 361 as follows:

"Considerable consideration was given in the courts below to the question whether an equitable charge, such as was founded on by Manilal in the present case, is recognized by the law of Malaysia. On this point the judgment of the Federal Court was against the respondents but since in the view they have taken of this matter the question need not be further considered their Lordships did not hear argument from the respondents upon it. Accordingly, their Lordships express no view on this question."

The penultimate paragraph has given rise to some difficulty. It is fair to say that the learned judge suggested referring the matter to the Privy Council but the parties asked the learned judge to deal with it. Nevertheless, it would seem that their Lordships' advice on the deletion was later sought. In a letter, they pointed to the penultimate paragraph of their judgment where the courts below have considered the question whether an equitable charge is recognized by the law of Malaysia. They made clear that

on that point the judgment of the Federal Court was against the respondents. The letter continued:

"... In their case on the appeal the respondents had submitted that such a charge was not recognized by the law of Malaysia. Their Lordships heard no argument on this aspect of the appeal, having decided that it might be disposed of in accordance with the submission of the parties by reference to when the cause of action arose. The only question argued before and decided by their Lordships was whether the claim was statute-barred and it was in this connection only that the question of whether there was a valid charge securing the debt was relevant.

Their Lordships accordingly concluded that, in view of the dispute upon whether an equitable charge is recognized in Malaysia, it would be inappropriate to affirm the judicial commissioner's order in this respect. The reference to the equitable charge was therefore deleted."

It is not uncommon for caveat and injunction to exist side by side. Together, they give a complete safeguard. In *Walsh* v. *Alexander*[5] where the defendant agreed to sell the plaintiff a certain homestead selection but subsequently repudiated the agreement, an order for specific performance was made and an injunction in terms was also granted. On appeal Barton A.C.J. said at p. 303:

"It is urged that the respondent's caveat sufficiently protects him, and therefore he cannot have an injunction. I do not agree. The caveat does not give the purchaser relief as comprehensive or as direct as he gains by the jurisdiction *in personam*, and therefore it cannot be held to be the exclusive remedy ...

Isaacs J. put it in another way at p. 305:

"... Mr. Loxton argued that as the legislature has provided for a caveat which effectually prevents a 'dealing' being registered contrary to the agreement, that ousts the ordinary jurisdiction of the court to grant an injunction. There are two answers to that. The narrow one is that a dealing by way of transfer or lease or mortgage is not the only method of transgressing the contract. Retention and user and alteration of the property by the defendant himself could not be prevented by a caveat, and these are equally within the dominion claimed by him. But the broader ground is this: that where rights and liabilities are not created by a statute, but arise by common law, then, even though they are affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed by common law, yet, unless the statute expressly or by necessary implication excludes the common law remedy, the latter still remains."

In the light of the view we took on the matter, we do not think it necessary to deal with the other points raised. We are satisfied that the learned judge has no jurisdiction to alter the Privy Council's decision. Hence, we allowed the appeal.

Appeal allowed.

Solicitors: *Gan Teik Chee & Ho; Maxwell, Kenion, Cowdy & Jones.*

LAU YEOK LIN & ORS. v. HIP SOON ENGINEERING & CONSTRUCTION SDN. BHD.

[A.C.J. (Lamin Mohamed Yunus J.) 15 March 1988]

[Kuantan – Civil Suit No. 22-35-87]

Civil Procedure – Order for attachment before judgment – Setting aside of order – Power of Registrar – Merits of application – R.H.C. 1980, O. 32 r. 9.

Civil Procedure – Affidavit dated before date of writ – Difference of one day – Whether affects validity of affidavit.

The plaintiffs agreed with the defendants for the purchase of certain equipment from the defendants. The plaintiffs made certain payments in accordance with the agreement. However, the plaintiffs were able to take delivery of only about half of the equipment and they were prevented from taking delivery of the rest of the equipment. They sued the defendants and prayed, *inter alia*, for an order for attachment before judgment of the remaining equipment. The application was made under Order 74 rule 5. The learned Senior Assistant Registrar heard the application and granted the order. The defendants applied to set aside the order but failed. They appealed. The defendants raised three grounds, namely:

(a) they objected to the Senior Assistant Registrar making the order on the ground that she had no power to do so;

(b) the affidavit of the plaintiffs in support of his application for attachment before judgment was not valid on the ground that it was dated earlier than the issue of the writ; and

(c) the proceedings were misconceived.

Held, dismissing the defendants' appeal: (1) in view of the provisions of the law and in the light of the decision in *Hwang Ju-in* v. *Huang Han Chao*,[1] the court cannot agree with the defendants that the Senior Assistant Registrar had no power to grant the order;

(2) as for the second ground, the difference was only one day and that did not affect the validity of the affidavit;

(3) as for the third ground, the plaintiffs are at liberty to choose any form of redress.

Cases referred to:

(1) *Hwang Ju-in* v. *Huang Han Chao* [1977] 2 M.L.J. 229 (apprvd).
(2) *H. Stacey* v. *Diamond Metal Products & Anor.* [1935] M.L.J. 249 (distd).
(3) *The "Sri Melati"* [1976] 1 M.L.J. 283 (refd).
(4) *Ong Heok & Anor* v. *Ooi Bee Tat & Ors.* [1982] 2 M.L.J. 326 (apprvd).

APPEAL AGAINST REGISTRAR'S DECISION.

Jaya Ramachandran for the plaintiffs/respondents.

Anthony Fernandez for the defendants/appellants.

Cur. Adv. Vult.